2664

United States Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation,

Plaintiff in Error,

vs.

SARAH J. IRVING,

Defendant in Error.

PETITION FOR REHEARING.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

GEO. W. KORTE,
White Bldg., Seattle, Wash.
CULLEN, LEE & MATTHEWS,
Spokane, Wash.
Attorneys for Appellant.

INLAND-AMERICAN PTG. CO.

United States Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation,

Plaintiff in Error,

vs.

SARAH J. IRVING,

Defendant in Error.

PETITION FOR REHEARING.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

GEO. W. KORTE,
White Bldg., Seattle, Wash.
CULLEN, LEE & MATTHEWS,
Spokane, Wash.
Attorneys for Appellant.

PETITION FOR REHEARING.

We have made a determined effort to bring ourselves to the belief that the opinion rendered in this case announces the correct rule of law. But after reading it many times, and analyzing the authorities therein cited, we are thoroughly convinced that the law has not been properly stated. Authorities of the most radical type are used to buttress this decision. Thompson, for example, in language more picturesque than temperate, "takes a fling" at the railroads and denounces a judge who would refuse to submit such a case to the jury.

It is important that railroads should not be hampered by unreasonable restraints, nor by any predetermination as to liability in the event of an accident. Trains are operated by human individuals, who are chargeable with a high degree of care, but no more. Derailments are exceptional, but possible. If this decision be permitted to stand, the railway company becomes a guarantor, and the fundamental principles of law, requiring the plaintiff to prove his case by a preponderance of the evidence, and that the defendant's liability be not based upon conjecture, will be subverted. Trains must be run with regularity and on schedule time; railway employes must do whatever is reasonably necessary for the safety of passengers. But making due allowance

for these considerations, the same degree of duty applies to them as to other people, namely, to exercise a degree of care commensurate with the situation; and that is all.

As has been made clear in our briefs, the plaintiff's right to invoke the *res ipso loquitur* rule is not questioned; but rather its erroneous application. Much confusion in this regard exists. Any decision not in accord with appellant's contention cannot possibly be consistent with settled principles. When all the cases are considered, no conflict will be found. The application of this rule is peculiarly one which must depend upon the particular facts of each case. In nearly every instance where an apparently contrary doctrine has been adopted there has been some evidence introduced affirmatively or by necessary implication, in addition to the bare legal presumption. If such has not been the case, the defendant's evidence has not been sufficiently strong to balance the presumption.

A presumption of *law* is a rule of law that a particular inference shall be drawn from a particular circumstance.

A presumption of *fact* is a rule of law that a fact, otherwise doubtful, may be inferred from a fact which is proved.

A presumption of fact or a natural presumption is one which, when a fact is proved therefrom, by reason of the connection founded on inference, the existence of another fact is directly inferred.

The presumption of law is merely the legal or artificial presumption, where the existence of one fact is not direct evidence of the existence of the other, but the one fact existing, the law raises an artificial presumption of the existence of the other.

Can there be any doubt about *res ipso loquitur* being a mere presumption of law, a legal, artificial, fictitious, arbitrary presumption, not based on any fact proven? And that such presumption is adopted to facilitate procedure because the defendant could better explain the accident? Courts which have said it is a presumption of fact, and that it is evidence, have not considered the real character of this presumption. Admittedly the inference is not based on any proven fact or evidence. Then why attach to the presumption the added significance by giving it evidentiary character, and probative force, when all know and must admit that this rule was never intended to be other than a rule of procedure? To say that it is evidence, argues in favor of a misconception of the primary meaning of this presumption.

Derailments have and do occur through no fault

or neglect of the railroads, but because they are of rare occurrence, and do not ordinarily happen except through negligence, and because all the facts are supposed to be, and may be, within the knowledge of the railway company, the law says it will be better to assume for the time being, (and until explained), that there was negligence. It was never intended that such was to be assumed as a fact,—as a verity. A demurrer admits the truthfulness of the allegations in a complaint, not as being in reality true, but for the purpose of argument, for testing the sufficiency of the complaint. It is a mere rule of procedure.

A presumption cannot contradict facts or overcome facts proved. Presumptions of law have no place for consideration when the evidence is disclosed. When, therefore, the record states the evidence, it will be understood to speak the truth on that point, it will not be presumed that there was other or different evidence respecting the facts relating to the derailment or that the facts were otherwise than as related.

If, for example, a judgment be rendered against a defendant by a court of general jurisdiction, the law presumes it valid and that jurisdiction of the person was duly obtained. But such a presumption is indulged only to supply the absence of evidence

or averments respecting the facts presumed. When it appears that the defendant was without the jurisdiction and never appeared, the presumption of jurisdiction over his person ceases, and the burden is upon the person who is enforcing the judgment to prove by *affirmative evidence* that the court did have jurisdiction over the person of the judgment debtor.

Galpin vs. Page, 18 Wall., 350:

> "But the presumption, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.
>
> * * * * * * * *
>
> "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the

party who invokes the benefit or protection of the judgment or decree."

"Presumptions can only stand when they are compatible with the conduct of those to whom it may be sought to apply them; and still more must give place when in conflict with clear, distinct and convincing proof."

Whitaker vs. Morrison, 47 Am. Dec., 627.
Fresh vs. Gilson, 16 Pet., 331.

Presumptions of law derive their force from jurisprudence and not from logic, and such presumptions are purely arbitrary in their application.

The section of Wigmore, 2509, cited in the court's opinion, has nothing to do with this question. It merely states the general rule as to when the *res ipso loquitur* rule should be applied. Wigmore Sec. 2487 (e) is pertinent to the present inquiry, and states the correct rule. *Menomonie, etc. vs. R. Co.,* 65 N. W., 176, cited in the note to the last mentioned section of Wigmore, was cited in our Brief, and is a leading case.

Most certainly, when considered in the light of its primary meaning and purpose, a legal presumption is not entitled to much significance, cannot appropriate to itself probative force or evidentiary character, and it is consequently easily removed. Its function was to settle the matter only provisionally. It has performed its duty when it compelled the defendant

to come forward with some evidence. When the defendant offered rebuttal evidence, the presumption vanished, if the evidence satisfies the requirement of some evidence. The evidence in this case went even further and not only rebutted the presumption, but raised a counter-presumption of due care on its part.

Respondent contended, and this decision holds, that defendant must dispel every possible act of negligence.

Such an argument in fact admits that the defendant's evidence herein satisfactorily explained the plaintiff's presumption, but surmises that the wreck might have been caused through some other act of negligence on the part of the defendant. Such other possible act of negligence is left purely to conjecture. The proving of one cause of the accident, for which the defendant is not liable, necessarily negatives the existence of any other cause. This court has never lent its approval to holding one liable on a conjecture of possible negligence. While counsel for the respondent argued that the defendant failed to overthrow the persumption of negligence because there might have been other particulars, in which the defendant might have been negligent, he did not point out to the court in what respect such negligence could have occurred. The only rule that has

ever been adopted in any case of this sort is that the arbitrary, fictitious, legal presumption is overcome when the defendant has proven the absence of negligence in those particulars as to which negligence might reasonably exist under the circumstances.

Smith vs. Northern Pacific Railroad Co., 53 N. W., 173 (N. Dak.).

> "We have examined many cases, but as each case depends upon its own peculiar facts, it would be useless to cite them. We will, however, refer to one which is confidently relied on as an authority. It is Greenfield vs. Railroad Co., 49 N. W., 95, an Iowa case. The opinion is not satisfactory in its reasoning. The chief point running through the opinion is that defendant failed to overthrow the presumption of negligence, because there might have been other particulars in which defendant might have been negligent, aside from defects in the engine or its construction, and aside from carelessness in operating it. In what such negligence could consist, or how it could have been instrumental in causing the fire, was not pointed out by the court. We do not approve of holding one liable on a conjecture of possible negligence. The better rule is that the arbitrary presumption is overcome when the defendant has disproved negligence in those particulars as to which negligence might reasonably exist under the circumstances."

Vorbrich vs. Geuter, etc., Mfg. Co., 71 N. W., 434, (Wis.).

In this case, Justice Marshall deemed the point involved herein of sufficient importance to write a

separate opinion. In it he shows how the cases apparently in conflict, are in reality harmonious, and among other things says.

> "In the recent case of Menomonie River Sash & Door Co. vs. Milwaukee, etc., Railway Co., 65 N. W., 176, this court, in an exhaustive opinion, by Mr. Justice Pinney, went over the whole ground, collating and commenting on substantially all the important adjudications in this court, and re-affirmed, without exception, the doctrine that where negligence arises as a presumption of fact from the happening of an accident with machinery, not a mere inference to be drawn by the jury, but a presumption so convincing and persuasive that, unexplained or unrebutted, it prima facie establishes the alleged negligence, such presumption is, nevertheless, overcome by conclusive proof that the machine was free from discoverable defect, so as to take the question in that regard from the jury. * * *
>
> "On the occasion in question, plaintiff claimed that the chain failed to respond to a release of the lever. The proof was that no defect existed in the apparatus that could be discovered or pointed out, and that the machine responded promptly to the manipulation of the lever before and after the accident. Counsel for plaintiff contended that the jury was warranted in finding that the failure of the machine to operate as usual at the time of the injury was owing to some defect therein. The court held to the contrary, and that a finding on counsel's contention could be based on mere surmise and conjecture that there was negligence somewhere, that if that were permissible some of the fundamental principles of the law of negligence would be done away with. That where an employe seeks compensation from a master for injuries received in the latter's employment, he must

trace it to some fault of the master, to some distinct failure of duty. * * *

"The foregoing sufficiently shows the substantial harmony existing to the effect that while, in a class of cases mentioned, an accident may be of such a character as to evidence negligence, and the inference in that regard may be so strong as to amount to a presumption of fact, not open to consideration by a jury, unless explained or rebutted, so as to throw doubt on the question, yet, when such inference or presumption arises from physical facts alone, and points to insufficiency in the construction or repair of machinery as the producing cause of the accident, conclusive proof that such machinery was free from all discoverable defects will wholly overcome it, and leave no legitimate basis for a finding of defectiveness which the owner ought to have discovered, and, reasonably, to have apprehended a personal injury might probably occur to some person whose personal safety ordinary care required him to guard. The principle here discussed we deem definitely established, as are substantially all principles pertaining to the law of negligence, the same as in any other branch of the law, civil or criminal."

The foregoing cases were cited in our former Brief, but they are leading cases, and referred to in most of the decisions on this point. We have referred to them herein in order to call the court's especial attention to this particular point, which we feel this court, in its opinion, has not duly considered. To carry the presumption to the extent of holding the defendant liable because of some presumed possible act of negligence, which is only in the realm of speculation, and which the fertile imagination of as-

tute counsel could not even point out to the court, is certainly subversive of the venerable and ancient landmarks of negligence law.

Nor can it be said that the case should have been submitted to the jury to pass upon the credibility of the witnesses. In the absence of any impeaching testimony, the witnesses of the defendant, even though in the employ of the defendant, are entitled to be believed.

Savage vs. Rhode Island Co., 67 Atl., 633 (R. I.), at 637:

> "It is to be noted, that in all of the above cases cited, the presumption contended for does not amount to evidence, so as to warrant a case to be sent to a jury as upon a conflict of testimony, where there is no other conflict than that which arises between the mere presumption of law, on the one side, and the positive, direct, uncontradicted, and unimpeached testimony on the other; *nor is it suggested in any of these cases that testimony of the character suggested above, even when given by employes of the defendant corporation, is so tainted with interest by reason of their employment as that it could be rejected by the jury, if it be fair, reasonable, and consistent in and of itself. We are satisfied that the plaintiff has failed to prove that the defendant was guilty of negligence."*

We would urge that the court again read this Savage case, also, in connection with the foregoing point, concerning this being a pure presumption of law and not one of fact.

See also, regarding the testimony of defendant's witnesses, which has not been rebutted, impeached, qualified, or in anywise limited,

Daly vs. Chicago, M. & St. P. Ry. Co., 45 N. W., 607, (Minn.).

Smith vs. Northern Pacific Ry. Co., 53 N. W. 173, supra.

Generally, the testimony of the defendant in cases of this sort is expert evidence, not based upon sufficiently broad hypotheses, or, the evidence is bereft of that certainty which is essential to holding the defendant's evidence to be conclusive as a matter of law, on the issues of a particular case. As, for example, in *Volkmar vs. Ry. Co.,* 31 N. E., 870, (N. Y.). A piece of iron fell from an elevated railroad injuring a person driving underneath the track. The track inspector testified that he performed his duties to the best of his ability. The court held that such testimony was a mere conclusion, and was not sufficiently strong to overcome the legal presumption. Compare such testimony with that introduced by the defendant in this case. It would serve no purpose to refer to that testimony in detail in this Petition. The person who had to do with the maintenance and repair of the track, testified regarding the ultimate facts and with a high degree of minuteness concerning the inspection and care of all the instrumentalities. In addition thereto, the bolts, rail, etc., were

introduced in evidence, with their silent, irrebuttable evidence that they could not have been in their present perfect condition had the derailment occurred through causes other than that which must be inferred from the defendant's explanation. In this case we do not have to deal with inconclusive, expert testimony, applied to a complicated statement of facts. Here we have the direct testimony of competent witnesses relating to simple physical facts, naturally open to satisfactory and accurate observation. There is no complicated mechanism involved.

Furthermore, in view of the declared policy of this state, as announced in the decisions of the supreme court, cited in our former Brief, the defendant had a right to reasonably expect that the rules therein adopted would be followed by the Federal Court. In the Washington cases, the leading authorities in support of defendant's contention, including Wigmore, are relied upon.

We respectfully submit that from the facts proven in this case, the court should not draw the legal conclusion set out in the opinion filed; that the court has not given due consideration to the underlying reasons for the application of the doctrine of *res ipso loquitur,* and that if the opinion and judgment are permitted to stand, grave injustice will result, not alone in this case, but in all cases of accidental in-

jury to passengers upon railway trains. The added burden to the carriers of passengers, and indirectly to the public through increased expense of operation, will be great. The courts have not intended to make the carrier an insurer of absolute safety, but the effect of this opinion is to do just that.

So important do we deem this matter to be that we earnestly petition the court to grant a rehearing and reargument of this case, in order that the law and the facts may again be presented. We confidently believe that such presentation would convince the court of its error.

Respectfully submitted,

GEO. W. KORTE,
Seattle, Wash.,

CULLEN, LEE & MATTHEWS,
Spokane, Wash.
Attorneys for Appellant.